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No. 88-1358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DeGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEFS IN OPPOSITION

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Respondents make only feeble defense of the "non-private" rationale adopted by the court of appeals for dispensing with the active-supervision requirement, and they offer no explanation as to how the *nonprofit* or *cooperative* attributes of an enterprise provide special grounds for immunity from the federal antitrust laws. As a leading

text has observed, in criticism of the district court decision in this case, "But many antitrust defendants have been nonprofit corporations that acted anticompetitively in behalf of themselves or their members." See Areeda & Hovenkamp, *Antitrust Law* ¶ 212.7 at p. 157 (1988 Supp.).

The only attempt to meet this problem is one that begs the very question at issue. Respondent CIPS argues that the "one fact" that distinguishes this case from "the honor-roll of decisions" [finding nonprofit and cooperative organizations in violation of the antitrust laws] is that the territorial agreement between CIPS and RECC was entered into pursuant to "a clearly articulated and affirmatively expressed policy to displace competition." Brief of CIPS 12-13. But this Court has held, of course, that the existence of such a clearly articulated policy is not enough; the second requirement is "active supervision," and the whole question presented is whether the nonprofit, cooperative nature of an otherwise private actor is enough to displace that second requirement.

The alternative grounds suggested by respondents for upholding the decision below are also without merit.

1. Respondent RECC suggests that its rates are in fact regulated or supervised ("closely controlled") by the federal Rural Electrification Administration ("REA"). Brief of RECC 8-9. But the materials cited by RECC show that REA's control over RECC's rates is directed to requiring that the rates cover RECC's indebtedness to REA, not to protecting consumers against excessive rates. This Court's decision in *Arkansas Electric Cooperative v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 385-89, 103 S.Ct. 1905, 1913-15 (1983) makes clear that REA is not and was never intended to be a substitute for state rate regulation.

2. Respondent CIPS argues that the active supervision requirement is *satisfied* because the Illinois statute implements and supervises the "policy" of permitting exclusive territory agreements, and that no supervision of rates is required because the state has "no policy" of regulating rates. Brief of CIPS 8-9. The argument, if accepted, would render the active-supervision requirement meaningless. The need for supervision arises because the state's policy of permitting exclusive territories confers on private entities the discretion to engage in anticompetitive conduct that would otherwise be forbidden by the antitrust laws—i.e., to set prices unrestrained by market forces. The supervision requirement is imposed in order to prevent abuse of that discretion, i.e., to control the resulting conduct.

It is strange that CIPS cites the recent decision in *Patrick v. Burget* in support of its argument. As CIPS notes with emphasis, *Patrick v. Burget* reaffirmed *Midcal's* holding that "the *anticompetitive conduct* 'must be "actively supervised" by the state itself.' " Brief of CIPS 8. CIPS might equally well argue that a state may have a policy of authorizing price-fixing agreements (and "supervising" them by enforcing them and resolving disputes under them) without supervising the prices set, because the state chooses to have "no policy" as to the prices that may be charged. If supervising the *anticompetitive conduct* that flows from a policy of permitting exclusive territories has any meaning, it must mean providing some supervision over the prices charged by the agreeing parties.

3. Respondent CIPS argues that the decision in *Town of Hallie* has reduced the active-supervision requirement to serving a mere "evidentiary function"—meaning, apparently, that if the state's policy of displacing the antitrust laws is articulated clearly and forcefully enough, the active supervision requirement disappears. Brief of CIPS

10-12. Nothing in the *Town of Hallie* opinion suggested that such an "evidentiary function" is the purpose of the active-supervision requirement outside the field of municipalities, which was the only aspect of the state-action doctrine addressed in *Town of Hallie*. The fact that that decision did not imply any dilution of the active-supervision requirement as to private actors is shown by this Court's subsequent decision in *Patrick v. Burget*, which emphatically reaffirmed the two-pronged requirement of the *Midcal* decision where nongovernmental entities or actors are involved.

4. Respondent CIPS appears to suggest that it could not be held liable even if RECC were, because its own rates are regulated. Brief of CIPS 7. The suggestion is plainly wrong. "[I]n the absence of state action immunity, a territorial agreement, even one between regulated utilities, is a per se violation of the Sherman Act." *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 665 F. Supp. 1493, 1532 (S.D. Fla. 1987) (citing authorities).

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be granted and the decision of the court of appeals should be reversed, in conformity with this Court's decisions in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Southern Motor Carriers Rate Conference Inc. v. United States*, 471 U.S. 48 (1985); and *Patrick v. Burget*, 108 S.Ct. 1658 (1988).

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